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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

A. The Background Facts

Petitioners are faculty members at Ferris State College, a public institution of higher education in Michigan. Since at least 1975, the Ferris Faculty Association-MEA-NEA ("FFA") has been recognized under the Michigan Public Employment Relations Act as the bargaining representative for a unit consisting of faculty and other professional employees at Ferris State College. FFA is a local affiliate of the Michigan Education Association ("MEA") at the state level and the National Education Association ("NEA") at the national level. Through a network of local affiliates such as FFA, both MEA and NEA represent and provide services to employees of public schools, colleges, and universities throughout Michigan (in the case of MEA) and the nation (in the case of NEA). PA 19a, 32a, 39a.[1] As required by its affiliation relationship with MEA and NEA, FFA has a "unified membership" structure—*i.e.*, if an employee chooses to become a member of FFA, he or she also must become a member of, and pay dues to, MEA and NEA. PA 2a, 19a.

During the 1981-82 academic year, which is the only year at issue in this case, PA 2a, petitioners were included in the bargaining unit represented by FFA, but chose not to join FFA. As permitted by Michigan law, the collective bargaining agreement that was in effect during that year contained a service-fee provision, pursuant to which all employees in the bargaining unit who refused to become members of FFA ("nonmember employees") were required to pay a service fee to FFA. The fee for nonmember employees who did not assert a timely objection was $284.00, which, as required by the collective bargaining agreement, PA 21a n.3, corresponded to the full amount of dues "uniformly required" of mem-

[1] "PA" refers to the Appendix to the Petition for Certiorari; "JA" refers to the Joint Appendix.

bers of FFA, PA 2a, 24a. Of that amount, $24.80 was disbursed to FFA, $211.20 to MEA, and $48.00 to NEA. PA 24a.[2]

B. The Proceedings Below

Petitioners objected to the amount of the FFA service fee, and filed this lawsuit contending, *inter alia*, that the unions were using their service fees to engage in certain activities for which objecting nonmember employees could not be charged under the First Amendment. After a twelve-day bench trial, the court concluded that the unions had established the chargeability of only 81% of the FFA portion of the fee, 3.4% of the MEA portion of the fee, and 2.75% of the NEA portion of the fee, PA 60a, 64a, 66a, for a total chargeable fee of $28.59, PA 75a.[3] Included in this amount were expenditures for certain activities which, in petitioners' view, may not constitutionally be charged to objecting employees. The activities in question, and the findings of the courts below with respect to them, are as follows.

1. *Activities of FFA.* The parties stipulated to the list of FFA expenditures that is set forth in Appendix A to the District Court's opinion. PA 78a-79a. Four of these expenditures are still at issue.

First, the District Court held that $1,026.84 "used to send FFA representatives" to the MEA and NEA Conventions (called "Representative Assemblies") is "fully

[2] Any nonmember employee who objected to paying the full amount of the service fee could pay a reduced fee determined through a procedure established by the unions. PA 23a. In the District Court, petitioners also challenged certain aspects of this procedure, but that challenge is no longer part of the instant case. *See* 643 F. Supp. 1306, 1311-12, 1330-34 (W.D. Mich. 1986), *modified*, 707 F. Supp. 1473, 1482, 1490 (W.D. Mich. 1988), *aff'd*, 893 F.2d 111 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 2586 (1990).

[3] The District Court acknowledged that the unions actually may have expended a significantly greater portion of their budgets for chargeable activities, but held that the unions had failed to meet the strict burden of proof that the court had imposed upon them. *See, e.g.*, PA 58a-59a, 61a-63a, 64a-66a.

chargeable" to objecting employees, PA 30a, 57a. The court based its holding on *Ellis v. Railway Clerks*, 466 U.S. 435, 448-49, 456-57 (1984), in which this Court had concluded that it does not violate the First Amendment to charge objecting feepayers for all costs associated with a national union convention. The Court of Appeals affirmed this ruling. PA 6a.

Second, applying "the same rationale," the District Court approved the chargeability of $666.42 in expenses incurred by FFA in "sending representatives to the 13E [C]oordinating [C]ouncil, where bargaining strategies and representational policies are developed for . . . the Ferris State College and Central Michigan University bargaining units." PA 30a, 58a. The Court of Appeals also agreed with this ruling. PA 6a.

Third, the District Court concluded that $149.99 spent by FFA on the Preserve Public Education ("PPE") Conference was chargeable to petitioners because the Conference was concerned with activities, including lobbying and millage elections, that "are absolutely necessary to fund public education" and therefore are "directly related to the statutory duties of the exclusive representative." PA 31a, 58a. The court credited testimony that described the PPE Conference as "really the front line bargaining of . . . contracts," because "if [the unions] have no way of raising that money, which is all allocated through the legislative process or [a millage] election, then [they] have no way to bargain." PA 31a. The Court of Appeals affirmed this ruling. PA 9a.

Fourth, based on the fact that FFA was engaged in extremely difficult negotiations with Ferris State College during 1981-82, PA 29a, the District Court held that FFA expenditures of $4,804.00—$3,821.04 for operation of a "crisis center/strike headquarters"; $832.96 "for informational picketing, media exposure, signs, posters and buttons"; and $150.00 "for rent to hold membership meetings"—were chargeable to petitioners. PA 30a.

The "crisis center," the court noted, "never became a 'strike headquarters' but still served a useful purpose in

the negotiations process." PA 59a. As for the "rent paid to hold membership meetings," the court deemed this expense "necessary to keep the employees of the bargaining unit apprised of the progress of the negotiations and to get feedback on the members' demands." PA 59a. And with regard to the disputed expenditures for public relations, the court stated that "these expenses are incurred for the purpose of informing the public of the issues involved in an attempt to bring public pressure to bear on the employer," and found that "[t]his type of public opinion and support is very important during contract negotiations involving public sector labor unions such as the FFA given the nature of the employment and the funding available to the college." PA 30a. The court credited testimony demonstrating that the actions taken by FFA were an "effectiv[e] . . . bargaining tool," and noted that "troublesome negotiations" precipitating this type of job action usually "are resolved at the bargaining table short of a strik[e]." PA 29a.[4] The Court of Appeals affirmed. PA 11a.

2. *Activities of MEA.* The District Court ruled that petitioners could be charged for the costs of two activities of MEA.

First, the court held that petitioners could be required to contribute to MEA expenditures of "$212,959 for the MEA [Convention] and . . . $118,216 for [sending representatives to] the NEA Convention," noting that "[b]oth are clearly chargeable . . . under *Ellis*." PA 62a-63a. The Court of Appeals affirmed, noting that *Ellis* had held that "the *entire* cost of the national union's convention was chargeable to employees, even though a portion of the convention was apparently 'political' in nature." PA 6a, 10a-11a (emphasis in original).

[4] The court emphasized the fact that FFA did not engage in an illegal strike, concluding that this fact was "of paramount importance," and stating that "[t]he question whether any of these expenditures may have been chargeable had a strike occurred is one that this court need not address." PA 59a.

Second, the District Court allowed the unions to charge petitioners for the costs of producing portions of the *Teacher's Voice*, "the primary publication of the MEA reporting on all activities of the organization" that was "distributed to all members of affiliated bargaining units." PA 33a. Noting that, under *Ellis*, the total of $254,092 expended on this publication "is chargeable to the same extent that the publication reports on activity that is chargeable," the court "reviewed . . . exhaustively" all issues of the *Teacher's Voice*, and "made an independent determination of the chargeable content" of those issues. PA 63a. The court's analysis "reveal[ed] that 81.6%" of the amount MEA expended on the *Teacher's Voice* was chargeable to petitioners, PA 63a, including all column inches categorized as "Collective Bargaining" and "Public Relations," and varying portions of the column inches categorized as "Lobbying," "Electoral Politics," and "Litigation." *See* PA 80a.[5] Again, the Court of Appeals affirmed this ruling. PA 9a-10a & n.1.

3. *Activities of NEA.* With regard to NEA, the District Court concluded that certain NEA expenditures had been shown to be "related exclusively to union activities that are clearly chargeable," PA 65a-66a, including $785,190 expended by the Affiliate Services area on

[5] In order to facilitate its review of all issues of the *Teacher's Voice*, the District Court relied on a "content analysis" of those publications, prepared by petitioners during this litigation, that divided articles in the *Teacher's Voice* into ten separate categories. *See* PA 80a; JA 197-250. As petitioners acknowledge, Brief for Petitioners at 17 n.8, the District Court admitted this "content analysis" into evidence solely for purposes of its mathematical measurement of column inches and its listing of the titles of articles appearing in the *Teacher's Voice*, and not for the self-serving description or categorization of those articles that petitioners also included in the "content analysis." *See* JA 24-26. Although the unions continue to disagree with the description and categorization of articles from the *Teacher's Voice* that is reflected in the "content analysis," we follow the lead of the District Court and in this brief use the disputed categories as a point of reference.

"Bargaining and Negotiation Support," JA 294-96; $284,814 expended by the Research area on "Collective Bargaining/Benefits Services," JA 296-99; and $395,801 expended by the Research area on "Studies/Special Projects" relating directly to the financing of public education, JA 299-300. *See* PA 65a-66a. Again, this ruling was affirmed on appeal. *See* PA 10a-11a.

SUMMARY OF ARGUMENT

Petitioners' basic position is that they may be charged under the First Amendment only for their pro rata share of the cost of union activities that are "necessary" or "essential" to negotiating a collective bargaining agreement with Ferris State College, administering that agreement, and adjusting grievances under it, but this position finds no support in this Court's prior decisions. The constitutional test for chargeability, as set forth in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), refined and applied in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), and recently reaffirmed in *Keller v. State Bar*, —— U.S. ——, 110 S. Ct. 2228 (1990), is whether the activities in question are germane to collective bargaining, contract administration, or grievance adjustment, or, more precisely, whether they are "normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative."

Focusing upon the activities of MEA and NEA, petitioners assert that, even if an activity is closely related to collective bargaining, it still is not chargeable unless it was undertaken directly on behalf of the bargaining unit to which the objecting employees belong. This argument is fatally flawed because: it ignores the judgment of the Michigan Legislature that the important state interest in labor peace is furthered by allowing a local bargaining representative to charge objecting employees for their fair share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities are not performed for the direct benefit of the objecting employees' bargaining unit; it fails to recognize the purpose of union affiliation,

especially the fact that FFA's ability to "implement or effectuate [its] duties . . . as exclusive representative" is enhanced by having constantly available to it, on an as-needed basis, services from its larger parent organizations; and it would impose upon MEA and NEA an unreasonable and unmanageable administrative burden, the effect of which would be to restrict the unions' ability to require every employee to contribute to the cost of collective bargaining activities.

All of the specific expenditures challenged by petitioners are for activities that are germane to collective bargaining, and are well within the range of constitutionally chargeable activities. Although some of the challenged activities (*e.g.*, lobbying on specific terms and conditions of employment, such as retirement, and increased funding for public education) are communicative and involve the expression of ideas, these activities nonetheless are chargeable to objecting employees because they result in little additional infringement of First Amendment rights beyond that already accepted as part of the agency shop itself, and none that is not justified by important government interests.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT PROHIBIT UNIONS FROM REQUIRING OBJECTING EMPLOYEES TO CONTRIBUTE TO THE COSTS OF ACTIVITIES THAT ARE NORMALLY OR REASONABLY EMPLOYED TO IMPLEMENT OR EFFECTUATE THE DUTIES OF AN EXCLUSIVE REPRESENTATIVE

Because this Court has indicated that "requiring" nonmember employees to support their collective-bargaining representative " 'has an impact upon their First Amendment interests,' " *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 301 (1986) (quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977)), petitioners argue that "strict scrutiny" must be applied to every expenditure that is disputed by objecting employees. According to petitioners, objecting employees may be required to pay their proportionate share only of those

expenditures that are "necessary" or "essential" to the union's performance of its statutory functions as bargaining representative. Brief for Petitioners ("P. Br.") at 6-12. As we now show, however, this position finds no support in this Court's prior decisions.

In its early union-shop decisions arising under the Railway Labor Act ("RLA"), the Court noted that dissenting employees lawfully could be charged for activities "in the realm of collective bargaining" or "for purposes . . . germane to collective bargaining," but not "as a cover for forcing ideological conformity or other action in contravention of the First Amendment." *Railway Employees v. Hanson*, 351 U.S. 225, 235, 238 (1956). *See Machinists v. Street*, 367 U.S. 740, 764 (1961) (unions may not force employees "to support political causes which they oppose"); *Railway Clerks v. Allen*, 373 U.S. 113, 121 (1963) (suggesting "a division of the union's political expenditures from those germane to collective bargaining").

Subsequently in *Abood*, the Court first relied on *Hanson* and *Street* to hold that objecting employees in the public sector could be compelled, consistent with the First Amendment, to contribute service fees for activities that are germane to collective bargaining, contract administration, and grievance adjustment, 431 U.S. at 225-26, 232. The Court then held that such employees, if they asserted a timely objection, could prevent the union from "spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Id.* at 232, 234; *see id.* at 236 (prohibiting subsidization of "ideological activities unrelated to collective bargaining").[6]

[6] The first limitation in *Abood*—that service fees may not be used to contribute to political candidates—directly implements the First Amendment interest in preserving each employee's autonomy in the electoral process. Because this process is the base for our entire democratic system, "the constitutional [free speech] guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). This limitation, of course, has no direct application in the instant case, because the unions contribute to political candidates only through political action committees, which are financed entirely by voluntary contributions from members, and all costs associated with administering those committees are treated as nonchargeable. *See* PA 43a; Trial Testimony of Peter McNenly at 41-42.

The second limitation in *Abood*—that service fees may not be used to support political or ideological activities unrelated to collective bargaining—is simply a restatement of the requirement that the union's expenditure of compelled fees must be reasonably related to the legislative purpose underlying the agency shop.

Other than stating that "[t]here will . . . be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited," *id.* at 236, the Court in *Abood* declined to address in specific terms which expenditures are constitutionally chargeable to objecting employees, *id.* at 236-37. The Court recognized, however, that the line between chargeable and nonchargeable expenditures "may be somewhat hazier" in the public sector than under the RLA, *id.* at 236, observing, for example, that "the ease of negotiating a final agreement [in the public sector] may be severely limited by statutory restrictions, by the need for the approval of a higher executive authority or a legislative body, or by the commitment of budgetary decisions of critical importance to others." *Id.* at 228. To illustrate this point, the Court stated that "[t]he process of establishing a written collective-bargaining agreement prescribing the terms and conditions of public employment may require not merely concord at the bargaining table, but subsequent approval by other public authorities," and that "related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Id.* at 236. Furthermore, the Court noted that successful bargaining in the public-sector involves "a blend of political ingredients, including community sentiment about unionism generally and the involved union in particular, the degree of taxpayer resistance, and the

views of voters as to the importance of the service involved and the relation between the demands and the quality of service." *Id.* at 228.

The Court again addressed the line between chargeable and nonchargeable expenditures in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), which involved a union-shop provision negotiated under the RLA as part of a collective bargaining agreement between Western Airlines and the Brotherhood of Railway, Airline & Steamship Clerks, Freight Handlers, Express & Station Employes, its intermediate System Board of Adjustment, and three of its local affiliates at Western Airlines (collectively "BRAC"). The objecting employees contended that they could "be compelled to contribute no more than their pro rata share of the expenses of negotiating agreements and settling grievances with Western Airlines," 466 U.S. at 439, and on that basis challenged the use of their fees to finance six activities of the national union —*i.e.*, the quadrennial convention; social activities; publication of a monthly magazine; general organizing efforts; litigation; and a death benefits program. 466 U.S. at 440. In ruling on these six expenditures, the Court first considered their chargeability under the RLA, articulating the following statutory standard:

> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of *not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.* [466 U.S. at 448 (emphasis added).]

Applying this statutory standard to the six challenged expenditures, *id.* at 448-55, the Court found the full cost

of conventions and social activities, and part of the costs of publications and litigation, chargeable to objecting employees under the RLA. The Court then turned separately to the constitutional issues raised by the case, concluding that the expenditures that it found chargeable under the RLA were "well within the acceptable [constitutional] range." *Id.* at 457. The Court first noted that "by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights," and that this impingement "is justified by the governmental interest in labor peace." *Id.* at 455-56. The determinative issue was "whether these expenses involve additional interference with the First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." *Id.* at 456.

With regard to BRAC's expenditures for social activities, the Court held that the only "communicative content" of the compelled subsidy was the fact that such activities were sponsored by the national union: *i.e.*, "that these are *union* social hours." *Id.* at 456 (emphasis in original). This fact, the Court held, already had been taken into account when allowing the union shop, and thus forcing employees to contribute to social activities of the national union "does not increase the infringement of . . . First Amendment rights already resulting from the compelled contribution to the union." *Id.*

The Court recognized that the national union's conventions and publications "have direct communicative content and involve the expression of ideas," but nonetheless held that there was "little additional infringement of First Amendment rights beyond that already accepted, and none that is not justified by the governmental interests behind the union shop itself." *Id.* In this regard, the Court observed that

> [t]he very nature of the free-rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds. " 'The furtherance of the common cause leaves some leeway for the leadership of the

group.'" [*Id.* at 456-57 (quoting *Abood*, 431 U.S. at 221-22, and *Street*, 367 U.S. at 778 (Douglas, J., concurring).] [7]

Finally, last Term, the Court addressed the issue of constitutionally chargeable activities in the context of an "integrated bar" that requires dues payments as a condition of practicing law. In *Keller v. State Bar*, 110 S. Ct. 2228 (1990), the Court made it clear that the statutory standard adopted in *Ellis*, *see supra* at 10, had constitutional application, noting that the *Ellis* "principles are useful guidelines for determining per-

[7] Although the Court also concluded that certain costs of litigation were chargeable under the RLA, 466 U.S. at 453, these costs were not specifically addressed in its constitutional analysis. It is implicit in the Court's opinion, however, that such litigation costs constitutionally may be charged to objecting employees.

The holding in *Ellis*, it should be noted, is squarely at odds with petitioners' alternative formulation of the chargeability standard—*i.e.*, that a bargaining representative may charge objecting employees only for those activities that it has a statutory "obligation to perform" or that it is obliged to perform under its duty of fair representation. *See* P. Br. at 14. BRAC was not required by the RLA or its duty of fair representation to perform any of the activities that the Court determined were constitutionally chargeable. Indeed, under Michigan law, and all other labor relations statutes in both the public and private sectors, a bargaining representative has an *affirmative* statutory obligation to undertake very few activities, and the duty of fair representation only requires a bargaining representative to treat all employees in the bargaining unit equitably in regard to those activities that it does choose to undertake. For example, FFA would not be in breach of any statutory obligation if it chose to engage in collective bargaining only with regard to wages or to process grievances only in the most narrow of circumstances, which means that most of the costs of collective bargaining and grievance processing would fall on the nonchargeable side of the line posited by petitioners.

The foregoing should be correctly understood. We certainly have no quarrel with the proposition that "[t]he designation of a union as exclusive representative carries with it great responsibilities," *Abood*, 431 U.S. at 221, but for the most part these are self-generated responsibilities, which reflect a union's institutional commitment to advance "the cause which justified bringing the group together," *id.* at 223 (citation omitted). These responsibilities are not limited to the bargaining representative's statutory obligations or its duty of fair representation.

missible expenditures in the present [constitutional] context as well." 110 S. Ct. at 2236. Although the Court did not attempt to discern "[p]recisely where the line falls," *id.* at 2237, between chargeable and nonchargeable activities, it focused once again on whether particular activities are "'germane' to the purpose for which compelled association was justified," *id.* at 2236 (quoting *Abood*). Thus, the Court stated that bar activities are chargeable if they are related to "the purpose of regulating the legal profession or 'improving the quality of legal service available,'" but are nonchargeable if they "hav[e] political or ideological coloration [and] are not reasonably related to the advancement of such goals." *Id.* at 2236-37.

In sum, prior decisions of this Court firmly have established that, because the agency shop "serves vital national interests in preserving industrial peace," it is constitutional to charge objecting employees for activities of a bargaining representative that are "germane" to the "purpose for which the compelled association was justified: collective bargaining." *Keller*, 110 S. Ct. at 2236. These activities include "not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative." *Ellis*, 466 U.S. at 448. *See id.* at 456 (even if union expenses involve additional interference with First Amendment rights, the issue is "whether they are nonetheless adequately supported by a governmental interest").[8]

[8] Although petitioners seek to support their position by reference to various statements drawn from this Court's prior decisions, many of these statements are torn from their context and, in some instances, actually misquoted. By way of example: (1) Petitioners repeatedly misquote the standard for chargeability that the Court adopted under the RLA in *Ellis*, 466 U.S. at 448, first by deleting the words "or reasonably" from the statement that "chargeable costs must be 'necessarily * * * incurred for the purpose of performing the duties of an exclusive representative,'" P. Br. at 10,

II. A BARGAINING REPRESENTATIVE CONSTITUTIONALLY MAY CHARGE OBJECTING EMPLOYEES FOR OTHERWISE CHARGEABLE ACTIVITIES OF ITS AFFILIATED PARENT ORGANIZATIONS, EVEN IF THOSE ACTIVITIES ARE NOT UNDERTAKEN DIRECTLY ON BEHALF OF THE BARGAINING UNIT TO WHICH THEY BELONG

Petitioners argue that the courts below erred in holding that they may be required to contribute to the costs of collective bargaining and other chargeable activities

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and then by deleting the words "not only" and "but also" from the statement that "objecting employees may be compelled to pay their fair share of * * * the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, [and] the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative," *id.* at 14-15. (2) Petitioners also misrepresent the decision in *Keller* by emphasizing the word "essentially" to suggest that the Court used that word as an adjective describing activities that are necessary or indispensable, when in fact the Court used the word "essentially" as an adverb to mean "in the same manner as." *Compare* 110 S. Ct. at 2237 (chargeable activities include "activities in which the officials and members of the Bar are acting essentially as professional advisors to those ultimately charged with the regulation of the legal profession") *with* P. Br. at 12 ("objectors' dues constitutionally may be used only when the Bar is 'acting *essentially*' in . . . regulating the legal profession") (emphasis in original).

As a substantive matter, petitioners place primary reliance for their view that "strict scrutiny" must be applied to every challenged union expenditure on the separate opinion in *Abood* that was authored by Justice Powell. *See* P. Br. at 7-9 & n.5 (quoting 431 U.S. at 255, 259 (concurring in the judgment)). But Justice Powell was a *dissenter* in *Abood*, and his disagreement with the majority focused precisely upon the fact that, in his view, the majority did *not* subject either the overall justification for the union-shop or the specific union expenditures financed by exacted fees to traditional First Amendment strict scrutiny. *Compare* 431 U.S. at 222 (majority opinion) ("the judgment clearly made in *Hanson* and *Street* is that *such interference as exists* is constitutionally justified by the legislative assessment of the *important* contribution of the union shop") *with id.* at 255 (Powell, J.) ("the State should bear the burden of proving that any [exacted] union

that are undertaken by MEA and NEA "on behalf of persons not employed in their bargaining unit." P. Br. at 18-19.[9] This argument, however, totally misses the point of union affiliation.

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dues or fees . . . are *needed* to serve *paramount* government interests") (emphasis supplied). Indeed, the aspect of Justice Powell's separate opinion in *Abood* that is most pertinent in the present context is his characterization of the majority opinion: "[T]he Court . . . decides that compelling an employee to finance any union activity that may be 'related' in some way to collective bargaining is permissible under the First Amendment because such compulsion is 'relevant or appropriate' to asserted governmental interests," 431 U.S. at 254.

Similarly unavailing is petitioners' reliance on *Hudson, supra.* Although establishing a procedural framework for protecting the constitutional rights of nonmember employees, the decision in *Hudson* does not indicate—and the rationale of the Court does not in any way suggest—that specific procedures adopted by unions to operate within this framework must be reviewed under the aegis of "strict scrutiny." To the contrary, the decision in *Hudson* expressly allows unions to calculate the amount of their service fee with less than "[a]bsolute precision," 475 U.S. at 307 n.18, to collect fees after providing nonmember employees with only "an adequate explanation of the basis for the fee," *id.* at 306, 310, to collect fees without a predeprivation hearing, *id.* at 309, 310, to provide objecting employees with expeditious arbitrations that do not utilize full evidentiary safeguards, *id.* at 308 n.21, and to escrow less than 100% of the fee paid by objecting employees while challenges to the fee are pending, *id.* at 310. In these and other areas, the Court plainly refused to impose on unions various procedural requirements that, because they might be more protective of First Amendment interests, would be required under the "strict scrutiny" standard urged by petitioners.

[9] There is no dispute that at least certain expenditures that are made by a bargaining representative's affiliated parent organizations may be charged to objecting employees. *See Hudson*, 475 U.S. at 307 n.18 (noting that, upon proper showing, objecting employees may be charged for "an item such as the Union's payment of $2,167,000 to its affiliated state and national labor organizations"). Thus, for example, if MEA or NEA assigned lawyers, negotiators, or other experts to assist FFA in negotiating a collective bargaining agreement with Ferris State College or in processing a grievance, the costs of this assistance to FAA, which would be for the direct benefit of the employes in the FAA bar-

The expenditure at issue—and the one that properly must satisfy the First Amendment—is *not* the cost of specific activities that are undertaken by MEA and NEA on behalf of other bargaining units in Michigan or elsewhere. Rather, it is the cost to FFA of maintaining its affiliation relationship with MEA and NEA. And in determining whether this cost is chargeable, the Court must consider whether FFA is enabled through that affiliation to more effectively "implement or effectuate [its] duties . . . as exclusive representative of the employees in the [petitioners'] bargaining unit." *Ellis*, 466 U.S. at 448. As we now demonstrate, the answer to this question clearly is yes.

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gaining unit, clearly would be chargeable. Petitioners presumably also would concede the chargeability of expenditures for MEA and NEA activities that benefit employees in all bargaining units represented by MEA and NEA affiliates, including the FFA bargaining unit. By way of illustration, NEA might produce research reports on issues of concern to all educational employees, such as studies relating to collective bargaining techniques or to the processing of grievances. Because these "indivisible" services assist FFA in the performance of its duties as bargaining representative, albeit in a less direct manner than discrete services provided exclusively to the FFA bargaining unit, it would follow that objecting employees in the FFA bargaining unit could be charged their pro-rata portion of the costs. *See* P. Br. at 23 ("The pro rata costs of ['services provided simultaneously to more than one unit, such as general research or training'], if chargeable in nature, can easily be determined by dividing their total costs by the number of employees in all units which receive them."). *But see infra* note 23.

What really separates the parties in this case is the chargeability of a third category of expenditures by MEA and NEA—*i.e.*, expenditures for activities that assist particular bargaining units throughout Michigan or in other States, but in any specific year may not directly benefit the employees represented by FFA. For instance, NEA may expend thousands of dollars to provide assistance during a bargaining crisis to employees represented by an affiliate in New Jersey, or MEA may provide resources to assist another bargaining unit in Michigan in the handling of a complex arbitration. Because it is essentially expenditures of this type that petitioners contend may not constitutionally be charged to objecting employees in the FFA bargaining unit, *see, e.g.*, P. Br. at 18, it is this contention that we address—and rebut—in text.

1. The appropriate starting point for analysis is the judgment made by the Michigan Legislature when it authorized public employee unions to collect service fees from nonmember employees:

> [T]he stability and effectiveness of labor relations in the public sector require . . . that all employees in the bargaining unit shall share fairly in the financial support of their exclusive bargaining representative.

Mich. Comp. Laws § 423.210(2).[10] To implement this legislative judgment, Michigan law provides that all nonmember employees may be required to pay a service fee that is based on, but may not exceed, "the amount of dues uniformly required of members of the exclusive bargaining representative." *Id.*; *id.* § 423.210(1)(c). Inasmuch as members of FFA are required to pay annual dues that include payments to FFA's state and national affiliates, the "dues uniformly required of members" of FFA includes payments that are transmitted to MEA and NEA.

Moreover, the Michigan Employment Relations Commission ("MERC")—the state agency responsible for interpreting and administering Michigan's service-fee statute—repeatedly has concluded that it serves Michigan's governmental interest in labor peace to require nonmember employees to pay their fair share of the chargeable expenditures of a bargaining representative's affiliated state and national organizations, regardless of whether those expenditures are made directly on behalf of employees in the particular bargaining unit. For example, in its 1986 decision in *Bridgeport-Spaulding Com-*

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[10] Thus, much like the congressional judgment that led to enactment of the union-shop provisions in the RLA and the National Labor Relations Act, the Michigan Legislature has "determined that it would promote peaceful labor relations to permit a union and an employer to conclude an agreement requiring employees who obtain the benefit of union representation to share its costs." *Abood*, 431 U.S. at 219; *see id.* at 224 ("[t]he desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller").

munity Schools, 1986 MERC Op. 1024, MERC held that chargeable expenditures are *not* limited "to expenditures incurred directly or exclusively for the benefit of the bargaining unit to which the objecting nonmember belongs," but rather include "some of the costs of representation in other units," *id.* at 1029; *id.* at 1057 ("to restrict chargeability to only those activities directly relating to the local bargaining unit is to totally ignore the fact of affiliation").[11]

Because this Court's "province is not to judge the wisdom of Michigan's decision," but only "to adjudicate the constitutionality of that decision," the only remaining question is whether this "legislative judgment was . . . an allowable one." *Abood*, 431 U.S. at 219, 224-25.[12] And an understanding of the reasons why employees choose to be represented by local unions that are affiliated with one or more larger unions, and the benefits that derive from such affiliation, dictate an affirmative answer to this question.

2. This Court has recognized that

> [t]he designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-

[11] *See also Garden City School District*, 1978 MERC Op. 1145, 1155-56; *Swartz Creek Community Schools*, 1971 MERC Op. 645, 653.

[12] Although this case necessarily is presented as a challenge to the judgment of the Michigan Legislature, precisely the same judgment has been made by every other State that has authorized the negotiation of agency-shop agreements, *see, e.g.*, Ill. Rev. Stat. ch. 48, § 1711 (requiring employees to pay a fair share fee "not to exceed the dues uniformly required of members"); *Abels v. Monroe County Educ. Ass'n*, 489 N.E.2d 533, 537-38 (Ind. App. 1986), *cert. denied*, 480 U.S. 905 (1987), and by Congress when enacting union-shop provisions in the RLA and the National Labor Relations Act, *see* 45 U.S.C. § 152, Eleventh (requiring employees to pay dues, initiation fees, and assessments "uniformly required as a condition of acquiring or retaining membership"); 29 U.S.C. § 158(a)(3) (requiring employees to pay dues and initiation fees "uniformly required as a condition of acquiring or retaining membership").

> bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. . . . The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required. [*Abood*, 431 U.S. at 221 (citation omitted).]

Local unions, such as FFA, affiliate with more broad-based labor organizations, such as MEA and NEA, in order to have access to services that will enable them to perform these "continuing and difficult" tasks more effectively.[13] Under the typical affiliation arrangement, a local bargaining representative agrees to make predetermined payments to larger labor organizations in return for services. These periodic payments (usually a per capita payment for each employee represented) are used by the affiliated parent organizations not only to defray the costs of the actual services that they may be called upon to provide to the local union, but also to ensure that those services are available to the local union, at all times, on an "as-needed" basis. In effect, affiliation enables the local union to stabilize the costs of its collective bargaining, contract administration, and grievance adjustment, and to spread those costs across a large number of bargaining units. Indeed, the employees in many bargaining units may be either unable or unwilling to amass the kind of financial and other re-

[13] Affiliation between a local union and more broad-based labor organizations is a well-established means of improving a local union's ability to provide efficient and effective representation for the members of a bargaining unit. *See NLRB v. Financial Institution Employees*, 475 U.S. 192, 199 n.5 (1986) ("[a] local union may seek to affiliate with a larger organization for a variety of reasons," including that "[t]he larger organization may provide bargaining expertise or financial support, or may compensate for a lack of leadership within the local union"); *Bridgeport-Spaulding*, 1986 MERC Op. at 1061-62 (the practical benefits of affiliation include "the opportunity to utilize the expertise of state and national organizations . . . relat[ing] to collective bargaining methods and goals").

sources necessary for their bargaining representative to function effectively during those years in which a collective bargaining agreement must be renegotiated or a major arbitration must be pursued. For these employees, an affiliation relationship with larger organizations may be the only feasible way to ensure that the necessary services will be available.[14]

In essence, the affiliation of a local union with larger labor organizations—like FFA's affiliation with MEA and NEA [15]—is analogous to the purchase of an insurance policy or to membership in an organization that guarantees services on demand for a predetermined annual rate. A person who joins the American Automobile Association, for example, pays a flat amount of dues

[14] *See, e.g.*, M. Estey, *The Unions: Structure, Development, and Management* 74 (3d ed. 1981) (noting that "the growing complexity of collective bargaining problems . . . has led unions, like their business counterparts, to make increasing use of staff specialists—economists, lawyers, accountants, etc.," and that "[t]he sheer expense of maintaining such staffs is beyond the resources of most local unions; [and] only national unions can afford it"); L. Ulman, *The Rise of the National Trade Union* 176, 185, 188-89 (1955) (noting that the development of national unions occurred, in part, because "[i]t was necessary for [local unions] to accumulate resources in periods of industrial peace," and there was a "need for financing strikes on this type of insurance basis"); J. Wallihan, *Union Government and Organizaiton in the United States* 18 (1985) (noting that "[u]nions, as service organizations, provide aid to their members and others, . . . much like an insurance agency to which they pay premiums with the expectation of returns and a guarantee of service should the need arise").

[15] Although the members of the bargaining unit at Ferris State College could have chosen to be represented by an independent or unaffiliated labor organization, a majority decided that it was in their best interests to be represented by a local union that had an affiliation relationship with MEA and NEA. As the courts below recognized, and as the official name of FFA (*i.e.*, the Ferris Faculty Association-MEA-NEA) reflects, the "'union as affiliated is the exclusive representative'" under Michigan law. *See* PA 6a, 58a (quoting *Bridgeport-Spaulding*, 1986 MERC Op. at 1062); *Kalkaska Public Schools*, 1978 MERC Op. 1052, 1056 ("affiliation has become an established pattern in the American labor movement").

each year, and in return is guaranteed emergency road service, travel assistance, bail bond protection, and other services normally provided by that organization. Similarly, a health maintenance organization "provides a wide range of health care services to a defined, enrolled population for a predetermined, prepaid premium [that is] unrelated to the actual number of services utilized by an enrollee in a particular time period." *See* Health Maintenance Organization Act of 1973, S. Rep. No. 129, 93d Cong., 1st Sess. 2, *reprinted in* 1973 U.S. Code Cong. & Admin. News 3033, 3034. In one year, no services may be needed; in the next year, several services may be utilized each month. In either case, the member pays the same annual amount.

In a similar fashion, by affiliating with MEA and NEA, the employees that FFA represents are able to pay a flat amount of dues or fees and, in return, are both assured of regular assistance in matters relating to collective bargaining, contract administration, and grievance adjustment, and "insured" against catastrophic expenses with regard to these matters. To be sure, MEA and/or NEA in any particular year may provide limited direct services to the FFA bargaining unit, and instead may expend their considerable resources to assist bargaining units in other parts of Michigan or in other States. But during a year when FFA is involved in renegotiating its collective bargaining agreement or in arbitrating a complex grievance, MEA and/or NEA may provide extensive assistance to the employees represented by FFA (well in excess of the annual amount that they receive in dues and fees). In either case, by deciding to affiliate with MEA and NEA, the members of FFA have agreed to pay the same flat amount each year in return for the constant *availability* of these services on an *as-needed* basis.[16]

[16] To give a concrete example involving the expenditures held chargeable by the courts below, all employees paying service fees to local unions affiliated with NEA—including those in the FFA bargaining unit—contribute to the cost of maintaining the programs through which NEA provides collective bargaining and research

Thus, petitioners are mistaken when they characterize the union's service-fee system as one that makes employees at Ferris State College pay for services provided to other bargaining units represented by MEA and NEA affiliates. The reality, as the District Court found, PA 56a, is that these employees are paying for a benefit that currently is being provided to them by their bargaining representative—*i.e.*, the *availability* of services germane to collective bargaining, contract administration, and grievance adjustment. And, as we now show, the First Amendment does not prohibit FFA from charging petitioners for their fair share of this benefit.

3. The decision by the members of FFA to affiliate with MEA and NEA, and to pool FFA's resources with those of other local unions, is a cost-effective (and, indeed, the most commonly adopted) method[17] of ensuring that services are available to members of a local bargaining unit. And we are aware of no principle embodied in the First Amendment that would prohibit FFA from choosing to "operate on a cost-sharing basis," especially when, as the District Court found, this "cooperative cross-funding enables the union to effectively represent individual members . . . while maintaining stable dues levels." PA 56a. To use the words of this Court, affiliating for this purpose is an "activit[y] or

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assistance. *See supra* at 5-6. Although FFA may not have occasion to avail itself of this assistance every year, it is not correct to argue, as do petitioners, that in years when it does not require such assistance FFA is paying NEA for nothing, or that FFA is simply supporting assistance provided to other units. The fact that NEA support is "waiting in the wings" is of benefit to FFA at any time that FFA is negotiating, administering, or adjusting grievances under its collective bargaining agreement.

[17] *See* Bureau of Labor Statstics, U.S. Department of Labor, *Directory of National Unions and Employee Associations* 77-78 (1975); D. Martin, *An Ownership Theory of the Trade Union* 39 (1980) (in 1974, union membership was distributed among 69,468 affiliated locals, whereas a 1967 survey revealed only 884 locals unaffiliated with national unions); R. Freeman & J. Medoff, *What Do Unions Do?* 35 (1984) ("[v]irtually all local unions are part of international unions").

undertaking[] *normally or reasonably employed* to implement or effectuate the duties of the union," 466 U.S. at 448 (emphasis added), that falls squarely within the "flexibility in [the] use of compelled funds" that the Court repeatedly has granted to unions faced with the "continuing and difficult" task of representing employees, *id.* at 456; *Abood*, 431 U.S. at 221. The payment of dues and fees to affiliated state and national organizations is no more, and no less, than the implementation of the "group's strategy" to further the collective interests of the employees represented by FFA. *Id.* at 223.[18]

Nor does the First Amendment prohibit a bargaining representative from providing services to its members by averaging the amount of its service fees over several years instead of allowing fee levels to fluctuate wildly from year to year. If objecting employees had to be charged for the actual costs of representing their bargaining unit in any given year on a "pay-as-you-go" basis, they would be required to pay differing amounts of fees in each year, including exorbitant fees in those years when especially heavy expenses were incurred in representing the bargaining unit.[19] Moreover, because of constant changes in the membership of the bargaining unit due to normal turnover in personnel, such a system would mean that some employees would have to shoulder a disproportionate burden in financing the activities of their exclusive representative, even though the benefits obtained by the union normally are spread evenly across

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[18] For this reason, petitioners' assertion that the decision of FFA to operate on a cost-sharing basis "is a voluntary decision made by unions, not a circumstance compelled by the state, much less a vital state interest," P. Br. at 21, although correct, is completely beside the point.

[19] Unless the bargaining representative also were to structure its membership dues on a pay-as-you-go basis—an arrangement that would make if difficult, if not impossible, for the local union to pay its rent, meet its payroll, fulfill its annual financial obligations to affiliated organizations, etc.—the nonmembers in these years would be required to bear a disproportionate share of the costs of representation. *See infra* note 21.

the years.[20] The provision in the Michigan statute that limits service fees to "the amount of dues uniformly required by members" reflects an awareness of these problems and, like all other laws authorizing union or agency shops that incorporate "dues levels . . . as benchmarks for service fees," PA 56a; *supra* note 12, encourages unions to adopt fee levels that are relatively stable from year to year.[21]

Perhaps most important, the decision by the members of FFA to secure services through affiliation is an administrative determination that does not "involve additional interference with the First Amendment interests of objecting employees" beyond that already countenanced by acceptance of the agency shop itself. *Ellis*, 466 U.S. at 456. Petitioners' complaint about contributing their service fees to the costs of FFA's affiliation arrangement with MEA and NEA does not relate to the communicative or expressive content of the services that these organizations make available to other bargaining units, inasmuch as they are charged only for the cost of activities of these parent organizations that are germane

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[20] When MEA or NEA assists FFA in negotiating a collective bargaining agreement, for example, the value of that assistance is realized not only in the year in question, but at the very least throughout the term of the agreement.

[21] The fact that Michigan's service-fee statute imposes this limit on fees also means that, under the type of pay-as-you-go service fee arrangement proposed by petitioners, objecting employees would receive a windfall, and become free riders, in those years when their proportionate share of these costs exceeded dues. As the District Court aptly put it:

> [Petitioners' position] would *logically* lead to drastic fluctuations in the amount of the service fee charged to the objecting nonmembers of individual units. Nevertheless, because most union/agency shop statutes tie the amount of the service fee to the amount of ordinary union dues, service fees can never legally exceed dues. Therefore, a unit-by-unit breakdown of chargeable expenses would only exacerbate the free rider problem and thereby frustrate the governmental interest that the Court has repeatedly recognized lies at the heart of statutes authorizing union/agency shops. [PA 56a-57a (emphasis in original).]

to collective bargaining, and therefore would be chargeable if performed on behalf of the FFA bargaining unit itself. Rather, petitioners' complaint stems from the fact that these payments are being made for activities that are being performed for bargaining units other than that represented by FFA. Much like the challenge of the objecting employees to social activities in *Ellis*, "the fact that [petitioners are] forced to contribute [to MEA and NEA] does not increase the infringement of [their] First Amendment rights. . . . Petitioners may feel that their money is not being well-spent, but that does not mean they have a First Amendment complaint." *Id.* at 456.

Finally, after noting that MEA has "800-900 local affiliates such as the FFA," and that NEA "represents approximately 12,000 bargaining units nationwide," PA 32a, 39a, the District Court found that "imposing a . . . requirement of a unit-by-unit breakdown" for all activities of MEA and NEA "would create an unreasonable and unmanageable administrative burden" on these unions. PA 57a. To support this finding, the court first stated that it was "not warranted by the facts at trial" to assume that MEA and NEA would be "able to break-out discrete expenses by bargaining unit." *Id.* In many instances, it literally would be impossible to allocate costs to any individual bargaining unit, such as FFA, that was one of many benefitting simultaneously from MEA or NEA activities. And even for those services that are directly attributable to a particular bargaining unit, any attempt to keep accounting records for those costs would create an overwhelming administrative and financial burden.[22] Moreover, even assuming *arguendo* that it were possible for MEA and NEA to create accounting systems to accommodate the calculation of the service

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[22] Witnesses before the District Court repeatedly testified that it would be "virtually impossible" or "not . . . even possible from a practical standpoint" for either MEA or NEA to allocate their costs to hundreds or thousands of individual bargaining units. *See* JA 22-23, 23, 35-36, 42, 42-43, 46, 84-85, 87-88, 108.

fee on a unit-by-unit basis,[23] the District Court concluded that "the marginal revenue received from service fee payors would not justify the cost of modifying the existing accounting systems to accommodate [such a] requirement," PA 57a, and therefore requiring a unit-by-unit breakdown of chargeable expenses "would be 'likely to infringe the union's right to expend *uniform exactions* under the [agency] shop agreement in support of activities germane to collective bargaining,'" PA 57a (emphasis in original) (quoting *Allen*, 373 U.S. at 122). *See Hudson*, 475 U.S. at 302 (" 'the objective must be to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto *without restricting* the Union's ability to require every employee to contribute to the cost of collective-bargaining activities' ") (quoting *Abood*, 431 U.S. at 237) (emphasis added).

4. Rather than addressing the underlying question of how affiliation with MEA and NEA impacts on FFA's ability to function as their bargaining representative, petitioners principally argue that the Court in *Ellis* already has adopted their position that the First Amendment prohibits unions from charging objecting employees for the cost of affiliation. Petitioners' reliance on *Ellis*, however, is misplaced.

In *Ellis*, the objecting employees were subject to a union-shop provision that had been negotiated under the RLA between their employer, Western Airlines, and their exclusive bargaining representative, BRAC. 466

[23] Petitioners' assertion that "[t]he pro rata costs of ['services provided simultaneously to more than one unit, such as general research or training,'] if chargeable in nature, can easily be determined by dividing their total costs by the number of employees in all units which receive them," P. Br. at 23, hardly provides an adequate answer. To begin with, the accounting problems referenced in text would surface in attempting to determine "the number of employees in all units which receive" the services in question during a particular year. Moreover, even if this determination could be made, it would not allow bargaining representatives to charge for the *availability* of services which employees in the bargaining unit do not actually "receive" during a particular year.

U.S. at 439. In affirming the chargeability of three activities of the national union—the quadrennial convention of the national union; social activities sponsored by the national union; and the monthly magazine published by the national union—the Court obviously found no merit in the contention of the objecting employees that they could "be compelled to contribute no more than their pro rata share of the expenses of negotiating agreements and settling grievances *with Western Airlines*." *Id.* at 439 (emphasis added). With regard to conventions, for example, the Court noted that BRAC's quadrennial gathering was a "national convention at which the members elect officers, establish bargaining goals and priorities, and formulate overall union policy," which means that the convention was not limited to concerns specific to the bargaining unit at Western Airlines. *Id.* at 448.[24] Similarly, the social activities held chargeable to objecting employees were "Grand Lodge [*i.e.*, national] expenditures," *id.* at 449, and again were not keyed directly to the employees in the bargaining unit at Western Airlines. And finally, the Court held that objecting employees could be charged for the cost of producing the national union magazine, which included "articles about negotiations, contract demands, strikes, unemployment and health benefits, proposed or recently enacted legislation, general news, products the union is boycotting, and recreational and social activities" that obviously concerned bargaining units other than Western Airlines. *Id.* at 450 (citing 685 F.2d 1065, 1074 (9th Cir. 1982)).[25]

[24] At the time of this convention, the national union represented hundreds of thousands of employees, in bargaining units throughout the country, in the railroad, airline, and maritime industries. 91 L.R.R.M. 2339, 2340, 2342 (S.D. Cal. 1976).

[25] Petitioners make much of the fact that *Ellis* held union organizing (and reporting about such organizing) to be nonchargeable. *See* P. Br. at 19. But the Court did not base this holding on the unit-by-unit standard urged by petitioners. Rather, the Court in *Ellis* held that organizing, whether conducted within the objector's bargaining unit or outside the unit, *see* 466 U.S. at 452 & n.13, is not sufficiently related to a union's duties as

Thus, the decision in *Ellis* does not support petitioners' assertion that chargeable activities are subject to a "bargaining-unit limitation." To the contrary, *Ellis* demonstrates that petitioners may be required, consistent with the First Amendment, to pay their fair share of the costs of collective bargaining and other chargeable activities that MEA and NEA undertake on behalf of employees in other bargaining units.

III. BECAUSE THE SPECIFIC EXPENDITURES CHALLENGED BY PETITIONERS ARE FOR ACTIVITIES GERMANE TO COLLECTIVE BARGAINING, THEY ARE CONSTITUTIONALLY CHARGEABLE TO OBJECTING EMPLOYEES

A. Lobbying On Matters Germane To Collective Bargaining

Petitioners challenge the decision of the courts below allowing the unions to charge them for the cost of lobbying legislative or executive officials on matters "directly related to collective bargaining, contract administration or the terms and conditions of employment." PA 52a-53a; *see* PA 7a (lobbying is chargeable if the subject matter is " 'pertinent to the duties of the union as a bargaining representative' ") (quoting *Robinson v. New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985)).[26] This challenge is without merit. Because, as we now show, such lobbying activities not only are germane, but in fact are vital, to effective collective bargaining in the public sector, no principle embodied in the First Amendment prohibits unions from charging objecting employees for the costs of these activities.

1. The starting point again is the judgment reached by the State of Michigan. Recognizing that collective negotiations and other direct dealings with the employer are not the only means by which unions representing public employees "act to promote the cause which justified bringing the group together," *Abood*, 431 U.S. at 223, Michigan has decided that it serves the State's interest in "industrial peace and stabilized labor-management relations," *id.* at 219, to require all union-represented public employees to pay for the costs of certain activities that relate to collective bargaining, but that occur at places other than the bargaining table.

Chief among these activities is lobbying of government officials with regard to matters related to wages, hours, and other terms and conditions of employment. Consistent with this Court's decision in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), Michigan has recognized that "labor's

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bargaining representative under the RLA to be chargeable at all, *id.* at 451-53. (We note in this regard that petitioners mischaracterize the decision of the District Court when they repeatedly state that it allowed the unions to charge objecting employees for the costs of "organizing" other bargaining units. *See* P. Br. at 17, 20-21. To the contrary, the District Court held that "the union defendants' expenditures for organizing are not chargeable," PA 55a (relying on *Ellis*), and this aspect of the lower court's judgment was not appealed. *See Bridgeport-Spaulding*, 1986 MERC Op. at 1030 ("organizing expenses should not be considered chargeable expenditures" under Michigan law.)) Nor did the Court's unique treatment of "general litigation" costs under the RLA announce any constitutional requirement of a unit-by-unit breakdown of the costs of services provided by a national union. *See id.* at 441, 453, 455. Indeed, the fact that the Court imposed such a statutory requirement for this one activity suggests that the Court's failure to require a unit-by-unit breakdown of constitutionally chargeable expenditures for other activities was not inadvertent.

[26] The specific lobbying activities found chargeable by the courts below include the following: (1) $149.99 expended by FFA on the PPE Conference, which was concerned with lobbying for "legislative appropriations" to ensure "funding for employment positions, salaries and benefits," PA 8a, 58a; *supra* at 3; (2) monies expended by MEA to publish articles in the *Teacher's Voice* reporting on MEA and NEA lobbying efforts with regard to specific terms and conditions of employment (*e.g.*, retirement and pension legislation, JA 206, 207, 208; laws governing length of school day and school year, JA 212; rules mandating in-service training, JA 216) and increased funding for public education, *see* PA 9a-10a & n.1, 63a, 80a; and (3) monies expended by the Research area of NEA, as part of its "Collective Bargaining/Benefits Services," to prepare reports on legislative activity affecting retirement and pensions for public employees, *see* JA 297-98.

cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context," *id.* at 565, and that employees frequently "seek to improve working conditions through resort to administrative and judicial forums," or through "appeals to legislators to protect their interests as employees," *id.* at 566. Based on this view of union representation, MERC has decided that "[l]obbying . . . aimed primarily at improving funding for education or securing legislation which will improve employment conditions" is "closely tied to collective bargaining issues and [therefore is] properly charged" to objecting employees. *Bridgeport-Spaulding*, 1986 MERC Op. at 1029, 1066; *see id.* at 1065 ("collective bargaining in the public sector requires resort to the legislature on various employment related questions"). The question presented by this case is whether that decision is "within the acceptable [constitutional] range." *Ellis*, 466 U.S. at 457.[27] As we demonstrate below, because resort to the legislative (or other governmental) forum to protect the interests of represented employees " 'relat[es] to the work of

[27] The same decision has been made by virtually every State that has authorized the agency shop as part of its labor-relations system for public employees. *See, e.g.*, Cal. Govt. Code § 3515.8 (objecting employees may be required to pay "the costs of support of lobbying activities designed to foster policy goals and collective negotiations and contract administration, or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through meeting and conferring with the state employer"); Mass. Gen. L. ch. 150E, § 12 (objecting employees may *not* be required to pay for "efforts to enact, defeat, repeal or amend legislation *unrelated* to the wages, hours, standards or productivity and performance, and other terms and conditions or employment, and the welfare or the working environment of employees represented") (emphasis added); N.J.S.A. 34:13A-5.5c (objecting employees may be required to pay "the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to those secured through collective negotiations with the public employer").

the union in the realm of collective bargaining,' " *Ellis*, 466 U.S. at 456 (quoting *Hanson*, 351 U.S. at 235), the answer is yes.[28]

2. Employee representation through collective bargaining in the public sector "is a process of governmental decisionmaking shaped ultimately by political forces." Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156, 1156 (1974); *Abood*, 431 U.S. at 228 (decisionmaking by a public employer engaged in collective bargaining "is above all a political process"). This "distinctive nature of public-sector bargaining" is based on " 'the special character of the [public] employer,' " *id.* 431 at 229, 230 (quoting Summers, *Public Sector Bargaining: Problems of Governmental Decisionmaking*, 44 U. Cin. L. Rev. 669, 670 (1975)), which is comprised of "different managers, budgetary officials, and legislative bodies," 431 U.S. at 228. As the Court in *Abood* expressly recognized, "the ease of negotiating a final agreement with the union [in the public sector] may be severely limited by statutory restrictions, by the need for the approval of a higher executive authority or a legislative body, or by the commitment of budgetary decisions of critical importance to others." *Id.* The fact that the legislative and executive branches have retained such significant decisionmaking authority over matters that affect the results of collective bargaining leaves a public-sector bargaining representative with little choice but to engage in lobbying of government officials with regard to these matters.

A review of public-sector labor relations in Michigan,

[28] Unions representing employees in the private sector likewise have recognized the important relationship between collective bargaining over terms and conditions of employment and lobbying with regard to statutes or regulations governing these issues, and traditionally have engaged in extensive lobbying to support the enactment and implementation of statutes that guarantee benefits or provide protections to the employees whom they represent. For purposes of this case, however, it is necessary to deal only with unions representing public employees.

and the lobbying expenses held chargeable by the courts below, amply illustrate this point.

First, the Michigan Constitution authorizes the State Legislature to enact laws that provide "for the resolution of disputes concerning public employees" and that "relat[e] to the hours and conditions of employment." Mich. Const. Art. 4, §§ 48, 49. Based in part on these constitutional provisions, the Legislature has allowed public employees to engage in collective bargaining, but at the same time has preserved the State's power to negate or revise collectively bargained agreements. Thus, the law of Michigan provides that the terms of any collective bargaining agreement are considered to be preempted or superseded by contrary statutes or administrative regulations issued by state agencies. *See, e.g., Detroit Police Officers Ass'n v. City of Detroit*, 391 Mich. 44, 66, 214 N.W.2d 803, 814 (1974) (the bargaining law "contemplates open negotiations between the parties unless controlled by a specific state law").[29] This interplay between state laws and collective bargaining agreements is incorporated into most labor contracts in Michigan, including the 1981-84 agreement between FFA and Ferris State College. *See* Def. Ex. I, §§ 1.5(A) & 4.1(B) (the agreement is effective "only to the extent [that its] specific and express terms are in conformance with the constitution and laws of the State of Michigan," and that any provision "will be deemed amended to the extent necessary to comply with . . . any decision of any . . . court or administrative body of competent jurisdiction").

There exist, moreover, a myriad of statutes and regulations that directly affect the terms of public employment in Michigan. With regard to all educational employees, for example, the Legislature has exercised direct

[29] *See also City of Grand Rapids v. FOP*, 415 Mich. 628, 637-38 n.6, 330 N.W.2d 52, 55 n.6 (1982) (rights of individual employees established by state and federal statutes may not be bargained away); *cf. Pontiac Police Officers Ass'n v. City of Pontiac*, 397 Mich. 674, 684, 246 N.W.2d 831, 836 (1976) (it is the "prerogative of the Legislature" to change the scope of bargaining).

control over retirement and pensions, Mich. Comp. Laws §§ 38.381-.388, 38.1301-.1407; wages and fringe benefits, *id.* §§ 408.381-.398, 408.471-.490; disability compensation, *id.* §§ 418.101-.941; occupational safety and health, *id.* §§ 408.1001-.1094; unemployment compensation, *id.* §§ 421.1-.67a; reemployment rights for veterans, *id.* §§ 32.271-.274; and access to personnel files, *id.* §§ 423.501-.512. With regard to public school teachers specifically, the Legislature has enacted statutes governing, *inter alia*, tenure, including the terms of probation, discharge, demotion, resignation, and leaves of absence, *id.* §§ 38.71-.191; sabbatical leaves, *id.* § 380.1235; holidays, *id.* § 380.1175; licensing and certification, *id.* § 380.1531; the length of the school year, *id.* § 380.1284; and the terms of employment upon consolidation of school districts, *id.* § 380.902a. These and other statutes, most of which deal with matters that traditionally are considered mandatory subjects of collective bargaining, either displace bargaining completely or set standards that establish a baseline for supplementary bargaining.[30]

Retirement benefits for public employees provides a particularly pertinent example of the interplay between state laws and collective bargaining because a large portion of the lobbying activity held chargeable by the courts below concerned this matter. *See supra* note 26. In Michigan, basic retirement benefits for public employees are established by statute, and educational employees are covered by either the Public School Employees Retirement Act, Mich. Comp. Laws §§ 38.1301-.1407, or the Optional Retirement Act, *id.* §§ 38.381-.388, the latter of which allows faculty and administrators at institutions of higher education, including Ferris State College, to choose between the retirement system for public school employ-

[30] With regard to this point generally, *see, e.g.*, Summers, 44 Cin. L. Rev. at 671 (discussing promotion policies fixed by civil service code); H. Wellington & R. Winter, *The Union and the Cities* 137-53 (1971) (discussing class size, student discipline, and curricular reform); H. Wellington, *Labor and the Legal Process* 247, 263 (1968) (discussing minimum wages, social security, unemployment and worker's compensation, and full crew laws).

ees and a privately-administered pension plan. The retirement system for public school employees is administered by a Public School Employees Retirement Board, which has the authority to promulgate rules to implement the statute. *See id.* §§ 38.1322, .1325. The statutory and regulatory provisions governing retirement benefits, whether adopted by the Legislature itself or by the Retirement Board in the exercise of its delegated powers, are incorporated into the collective bargaining agreements negotiated by virtually every affiliate of MEA, including the agreement between FFA and Ferris State College. *See* Def. Ex. I, § 15 (requiring members of FFA to "elect to participate in either the (1) Michigan Public School Employees' Retirement Fund, or (2) Optional Retirement Program," and providing that the amount of employer contributions to the optional plan is "the same amount" as required by the state statute, unless that amount dips below ten percent of salary, in which case the bargaining agreement controls). Thus, to enhance, or to prevent the erosion of, collectively bargained retirement benefits for the employees that it represents, FFA and/or its affiliated parent organizations of necessity must lobby the Legislature and the Retirement Board.

Nor is Michigan's treatment of retirement benefits unique. Virtually all terms and conditions of public employment in Michigan are negotiated at the bargaining table, but the agreements reached are, *at all times*, subject to invalidation, revision, or supplementation by state legislative and executive decisionmakers. Because the content of collective bargaining agreements is so inextricably intertwined with statutory and regulatory developments—indeed, from the perspective of a public-employee union, state statutes and regulations serve as a direct substitute for agreements reached at the bargaining table—it hardly can be denied that lobbying by public-sector unions in Michigan on specific terms and conditions of employment is "germane" to collective bargaining.

Second, the courts below also held that lobbying by FFA, MEA, and NEA to increase funding for public education is chargeable to petitioners. Referring to this Court's observation in *Abood* that "budgetary and appropriations decisions could be regarded as an 'integral part of the bargaining process' for public employees," PA 5a (quoting 431 U.S. at 236), the Court of Appeals held that government decisions on such financial matters "directly affect the terms and conditions of employment for public employees," PA 7a, and therefore that "securing funding for public education in Michigan . . . is directly related to the duties of an exclusive bargaining representative," PA 8a. As the District Court put it, lobbying to increase funding is "really the front line bargaining of [the unions'] contracts," because "if [the unions] have no way of raising that money, which is all allocated through the legislative process or an election, then [they] have no way to bargain." PA 31a.

These holding are clearly correct. Unlike collective bargaining in the private sector, where employers generally have the authority to make financial commitments and to carry them out, wages and other monetary benefits for public employees are dependent upon tax rates and governmental budgets, and it often is not "legally possible or politically sensible" for individual public employers to make final determinations regarding these subjects at the bargaining table. Summers, 44 U. Cin. L. Rev. at 670. *See* Summers, *Bargaining in the Government's Business: Principles and Politics*, 18 Toledo L. Rev. 265, 266 (1987) ("employer representatives at the bargaining table have limited authority to make binding agreements because wage increases or benefits are dependent on the budget, which is dependent on taxes, and these are matters for the legislative body, not the negotiators"). Because the public employer "must gain the consent of higher levels of political authority,"[31] or be-

[31] J. Dunlop & N. Chamberlain, *Frontiers of Collective Bargaining* 127 (1967); *see* E. Beal & J. Begin, *The Practice of Collective Bargaining* 465 (6th ed. 1982); Project, *Collective Bargaining*

cause the employer "depends on some other source such as state aid for its revenues," [32] it is incumbent upon the bargaining representative to engage in various forms of lobbying in order to persuade the relevant agencies of government to appropriate sufficient funds to implement the contractual arrangements that have been, or will be, bargained.[33]

Indeed, the Court in *Abood* acknowledged the necessity of such lobbying when it noted the importance to the public-sector bargaining process of "related budgetary and appropriations decisions." 431 U.S. at 236. Although petitioners attempt to limit this statement to "lobbying the employees' public employer to budget and appropriate funds necessary to pay salaries and benefits set out in the contract," P. Br. at 28, there is no logical reason to distinguish lobbying of government officals who actually control the finances of the public employer from lobbying the public employer itself.[34] In this case, for example, it is undisputed that the nominal "public employer"—*i.e.*, the Board of Control of Ferris State College—obtains virtually all of its funding from state appropriations that are directly earmarked for Ferris State College, *see* 1989 Mich. Pub. Act 195; PA 93, and that a large portion of these appropriations is used to fund salaries and benefits for employees of the college, including

and Politics in Public Employment, 19 U.C.L.A. L. Rev. 887, 923 (1972).

[32] M. Lieberman, *Public Sector Bargaining* 71 (1980).

[33] It is this direct fiscal dependence of most public employers that renders inapt comparisons to lobbying by private-sector unions designed simply "to increase a private employer's income." Brief *Amicus Curiae* of the Public Service Research Council, Inc. at 13 n.24.

[34] Nor is there any principled reason to distinguish between lobbying that takes place *after* collective bargaining has been completed to secure the funds necessary to implement salaries and benefits that have been contingently agreed upon, and lobbying that seeks prior to or during collective bargaining to secure sufficient funds to enable a public employer to make unconditional financial commitments in the first instance.

the collectively bargained salaries and benefits of the employees in the FFA bargaining unit. In these circumstances, lobbying to increase funding for Ferris State College might well be considered "an integral part of the bargaining process." 431 U.S. at 236. At the very least, however, these factors demonstrate that the District Court was correct when it concluded that, "[i]n a public sector bargaining unit where funding for employment positions, salaries and benefits is conditioned upon legislative appropriations, such lobbying is directly related to the statutory duties of the exclusive representative." PA 58a.[35]

Third, because petitioners have so thoroughly distorted the record in this case, it bears repeating that the unions are not contending that petitioners may be charged for the costs of lobbying on policy issues of general public concern that are not related, or are related only incidentally, to collective bargaining. As Justice Douglas noted in his concurring opinion in *Street*:

> If [compelled] dues are used . . . to promote or oppose birth control, to repeal or increase the taxes on cosmetics, to promote or oppose the admission of Red China into the United Nations, and the like, then

[35] Noting that "[n]one of the state and federal monies Ferris receives are earmarked for salaries and benefits," petitioners argue that lobbying for increased funding is not related to collective bargaining because the connection between such funding and increased salaries and benefits is "not even necessary." P. Br. at 29. If by this statement petitioners are suggesting that increases in funding do not *necessarily* result in increases in salary, they are stating a truism that is of no moment to this case, since even those activities that are indisputably germane to collective bargaining do not *necessarily* result in contractual improvements. If, on the other hand, petitioners are suggesting that increased state or federal funding for Ferris State College is not *necessary* to increases in salaries and other economic benefits, then petitioners are simply wrong. Both the record in this case, *see, e.g.*, JA 34-35, and the practical realities of collective bargaining in the public sector, confirm that improvements in salaries and other economic benefits *cannot occur* without increases in funding from the appropriate public authorities.

> the group compels an individual to support with his money causes beyond what gave rise to the need for group action. [367 U.S. at 777.]

For this reason, the unions conceded at trial that they could not charge petitioners for the costs of lobbying with regard to various matters, including, *inter alia*, tuition tax credits, voluntary prayer in the schools, the teaching of creationism, juvenile justice, the Equal Rights Amendment, extension of the Voting Rights Act, the rights of Native Americans, a nuclear weapons freeze, redistricting and reapportionment, capital punishment, abortion, and gun control, *see* JA 204, 208, 213, 214, 216, Trial Testimony of Elizabeth Baker at 594-96, and the District Court deemed all of this lobbying to be nonchargeable when it analyzed the contents of the *Teacher's Voice*.[36] In contrast to these lobbying activities, however, the matters on which lobbying was held chargeable by the courts below—*i.e.*, lobbying with regard to specific terms and conditions of employment, such as retirement, and lobbying in support of increased funding for public education—are directly related to collective bargaining by the unions in this case.

3. Once it is established that the lobbying activities held chargeable by the courts below are "germane to collective bargaining," *Ellis*, 466 U.S. at 456, the remaining question is whether those activities involve additional interference with the First Amendment interests of objecting employees beyond that already countenanced by allowance of the agency shop itself, and if so, whether

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[36] As the Court of Appeals noted, PA 10a n.1, the District Court "may have erred in permitting [petitioners] to be charged for a few particular articles," such as those involving "utility rates and a nuclear weapons freeze." The appellate court nonetheless refused to reverse on the basis of "allegations of essentially *de minimus* error," because it believed that the District Court had "correctly interpreted and applied the law," and did not consider it appropriate for a reviewing court to analyze "each and every union expenditure, no matter how minor, for conformity with the law."

that interference is adequately supported by the asserted governmental interest, *id.*

Like the union publications and conventions that were at issue in *Ellis*, lobbying is a communicative activity and involves the expression of ideas, but also like union publications and conventions, the lobbying held chargeable by the courts below results in "little additional infringement of First Amendment rights beyond that already accepted, and none that is not justified by the governmental interests behind the union shop itself." *Id.*

The subject matter of the lobbying by the unions in this case—*i.e.*, specific terms and conditions of employment, such as retirement, and increased funding for the public employer—are the "nuts and bolts" issues that face unions representing public employees. Whether these issues are discussed and decided at the bargaining table, or whether they are the focus of proposed legislation and regulation by the government, the subject matter—and accordingly the degree of infringement of First Amendment rights—remains the same.[37] What petitioners are in effect arguing, therefore, is that lobbying should be considered constitutionally nonchargeable "political activity"[38] solely because of the *forum* in which

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[37] Indeed, because collective bargaining in the public sector directly impacts the decisionmaking process of the government representatives who sit on the other side of the bargaining table, it could be argued that the First Amendment interests of objecting employees are subject to *less* impairment when their fees are used to finance the lobbying at issue here than when they are used to support collective bargaining. With regard to lobbying, not only is the impact on governmental decisionmaking less direct, but the objecting employees at least retain their freedom to criticize or disavow their bargaining representative's position in the same legislative or administrative forum in which the union is speaking. *See Madison Joint School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976).

[38] Nor does it advance petitioners' argument to label lobbying as "political activity"; the Court in *Abood* recognized that collective bargaining in the public sector is "inherently 'political,'" 431 U.S. at 227, and stated that "[n]othing in the First Amendment or our cases discussing its meaning makes the question whether

it takes place—*i.e.*, in the "political arena[]." P. Br. at 26, 27, 29. But the Court has made clear that, for purposes of determining chargeability, the forum in which a challenged activity takes place is not controlling, inasmuch as *Abood* indicated that lobbying to ratify and provide funding for collective bargaining agreements might be constitutionally chargeable, 431 U.S. at 236, and *Keller* held that objecting members of a mandatory bar could be charged for those bar activities that are related to regulation of the profession, including recommendations with regard to "admission to practice, the disciplining of lawyers, codes of conduct, and the like," regardless of whether those recommendations are made "to the courts or the legislature." 110 S. Ct. at 2235.

But even if there were some additional infringement of First Amendment rights caused by lobbying, the dispositive question for constitutional purposes would be whether lobbying on matters that have a direct bearing on collective bargaining is sufficiently related to the the asserted state interest in promoting "peace[ful] and stabilized labor-management relations" to overcome that additional infringement. The State of Michigan has determined that it is, and nothing in the First Amendment prohibits the State of Michigan from implementing this judgment.

In sum, the First Amendment allows unions to compel objecting employees to financially support lobbying on matters that are germane to collective bargaining—*i.e.*, so long as the lobbying is undertaken "to promote the cause which justified bringing the group together." *Abood*, 431 U.S. at 23. Based on this standard, the courts below correctly held that lobbying on specific terms and conditions of employment, and lobbying to increase funding for public education, are constitutionally chargeable activities.

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the adjective 'political' can properly be attached to [union activities] the critical constitutional inquiry," *id.* at 232.

B. Millage Votes And Other Ballot Issues

Petitioners challenge the chargeability of union activities in support of millages and other ballot issues designed to increase the level of funding for public education, including the cost of the PPE Conference, which the District Court found chargeable as an expenditure to "pass millages, fight ballot issues, and do the kind of things that are absolutely necessary to fund public education," JA 31a, and the cost of certain articles in the *Teacher's Voice* that described similar activities of MEA, PA 80a.[39] The issue presented by this particular challenge is not, as one might suppose from reading petitioners' brief, whether objecting employees may be charged for union activity undertaken in connection with all ballot issues, or even with all millages that might increase funding for public agencies generally. The issue is, rather, whether they may be charged for those activities in support of millages or ballot issues directly affecting the level of funding available for educational employers.[40] And on this issue, the determinative ques-

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[39] With regard to the PPE Conference, petitioners selectively cite record documents to dispute the District Court's finding, affirmed by the Court of Appeals, that this Conference was directed at securing funding for public education in Michigan, PA 31a, and allege that the Conference had other "political" or "legislative" purposes, P. Br. at 32. With regard to the articles in the *Teacher's Voice*, petitioners speculate as to which of the articles that they categorized as "Electoral Politics," *supra* note 5, were considered chargeable by the District Court, and then allege that the courts below erroneously concluded that these articles concerned funding for public education. In neither case, however, have petitioners demonstrated that the factual findings of the District Court are clearly erroneous, or that any errors by the courts below are of constitutional significance. *Cf. Hudson*, 475 U.S. at 307 n.18 ("[a]bsolute precision in the calculation of the charge to nonmembers cannot be expected or required") (citation omitted).

[40] For this reason, petitioners assertion that union support for general "[t]axation" is more akin to "the election of pro-labor political candidates" than to a "budgetary [or] appropriations decision that might be seen as an integral part of the bargaining

tion is whether support for such millages and ballot issues is sufficiently related to collective bargaining to advance the state's interest in preserving labor peace and stabilizing labor relations in the public sector. For reasons already explained above, *supra* at 35-37, increasing the funding available for public education and bargaining collectively for educational employees are so intertwined that the former clearly is germane to the latter. Again, the only difference between union activities in support of this defined category of millages and ballot issues that is closely connected to collective bargaining and other clearly chargeable union activities is the forum in which the activity takes place. And, as previously indicated, *supra* at 39-40, this difference in forum is not constitutionally determinative in the present context. In short, because these "electoral" activities of the unions were designed to increase funding for public education, expenditures for those activities should be chargeable to objecting employees.

C. "Public Relations" Activities

Two expenditures that petitioners characterize as "public relations" activities were held chargeable and are at issue here: monies expended by FFA during negotia-

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process," P. Br. at 33 (citations omitted), is beside the point. The courts below did not hold that activities by the unions to support general "taxation" are chargeable to petitioners; rather, their rulings were limited to "millage and ballot campaigns *necessary to fund public education*" because, as the Court of Appeals put it, "the terms and conditions of employment for the public sector employees represented by the unions in this case are obviously closely connected to the funding provided to public education," PA 9a (emphasis in original).

Nor are petitioners correct when they assert that "taxation relates only indirectly and contingently to bargaining." P. Br. at 33. Millages in Michigan are used to provide direct funding for local school districts, intermediate school districts, or community college districts, and the public school code expressly provides that money raised by these millages "shall not be used for a purpose other than that for which it was raised without the consent of a majority of the school electors," Mich. Comp. Laws § 380.1216. *See also supra* note 35.

tions with Ferris State College for "informational picketing, media exposure, signs, posters and buttons," PA 30a, 59a, and the costs of various articles published in the *Teacher's Voice* concerning efforts to galvanize community support for the unions and for public education in general, PA 80a; JA 227-29.

In the context of public-sector bargaining, where "the employer is the public—in ultimate political terms, the voters to whom the public officials are responsible," Summers, 83 Yale L.J. at 1159, unions frequently are forced to "go public" in an effort to develop community support that will, in turn, generate constituent pressure on public employers. Indeed, such employers may modify intransigent positions at the bargaining table if the "costs of disagreement" in terms of voter opposition become too high. *See* J. Dunlop & N. Chamberlain at 150-52. As this Court stated in *Abood*:

> Whether [government representatives who sit at the other side of the bargaining table] accede to a union's demands will depend upon a blend of political ingredients, including community sentiment about unionism generally and the involved union in particular, the degree of taxpayer resistance, and the views of voters as to the importance of the service involved and the relation between the demands and the quality of service. [431 U.S. at 228.] [41]

Because these public relations activities are undertaken in an effort to persuade employers to alter their bargaining positions, and to accede to union demands, they serve as the functional equivalent of the economic strike in the private sector and, as such, clearly should be chargeable to objecting employees.

The expenses incurred by FFA during negotiations for "informational picketing, media exposure, signs, posters and buttons" were, as the District Court observed, "ex-

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[41] *See also Bridgeport-Spaulding*, 1986 MERC Op. at 1066 ("[t]o be effective, a teachers' representative must keep the public informed of issues such as millages or the status of contract negotiations," and therefore "public relations activities, like conventions and social activities, are a standard feature of union operations").

penditures for disbursing information to the public that [is] favorable to the bargaining unit's position," PA 59a, which is "very important during contract negotiations involving public sector labor unions such as the FFA," PA at 30a. The expenses incurred by MEA for publishing articles to "enhance the reputation of the teaching profession," PA 12a, although less directly tied to an ongoing dispute in negotiations, also were designed to assist the unions in obtaining community support for their positions at the bargaining table.[42] Accordingly, the courts below were correct when they held that these expenditures are chargeable to petitioners.

D. Professional Activities

Again focusing on the *Teacher's Voice*, petitioners contend that the column inches categorized as "Other Material" impermissibly were held chargeable by the courts below, PA 80a, because they include articles about "teaching and education generally, professional development, unemployment, job opportunities, award programs of the MEA, and other miscellaneous matters," P. Br. at 36.[43] But these professional activities are designed to improve the instructional methods and other professional skills of employees represented by the unions, and as such they are closely related to an aspect of employment that has been held to be a mandatory subject of bargaining under Michigan law. *See CMU Faculty Ass'n v. Central Michigan University*, 404 Mich. 268, 273 N.W.2d 21 (1978) (programs concerned with "teaching effectiveness," including "the elements, procedures and criteria involving evaluations for purposes of reappointment, retention and promotion" are mandatory subjects of bargaining).[44]

In addition, these professional activities are designed to eliminate employer-employee friction and to create harmonious working relationships among represented employees. The Court of Appeals analogized these expenditures to the union social activities held chargeable in *Ellis*, and concluded that "professional/educational expenditures intended to improve the profession generally and the skills of teachers specifically are . . . sufficiently related to the unions' duty to represent bargaining unit employees effectively so as to be chargeable to dissenters." PA 12a. This ruling should be affirmed.[45]

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[42] Petitioners cite *Beck v. Communications Workers*, 776 F.2d 1187, 1211 n.32 (4th Cir. 1985), *aff'd on other grounds*, 800 F.2d 1280 (4th Cir. 1986) (en banc), *aff'd on other grounds*, 487 U.S. 735 (1988), for the proposition that "creating a favorable climate of public sympathy and support for a union is 'not "reasonably necessary . . . for the proper effectuation" of collective bargaining,' " P. Br. at 36, but that case lends no support to their position. Quite apart from the dispositive fact that *Beck* involved a private-sector union, the expenditures for "community services" that were found nonchargeable in that case did not involve public relations on bargaining, employment, or union image, as in this case. The *Beck* expenditures were for contributions to particular charities, *see* 776 F.2d at 1211, and the unions here have conceded that their charitable contributions are not chargeable.

Equally unconvincing is petitioners' attempt to analogize the public relations activities at issue in this case with the organizing expenditures at issue in *Ellis*. *See* P. Br. at 36. The Court in *Ellis* held organizing costs to be nonchargeable under the RLA because such expenditures are aimed at the "expansion" or growth of unions, and "afford only the most attenuated benefits to collective bargaining." 466 U.S. at 451-52. The public relations activities at issue here, in contrast, are specifically designed to enhance the bargaining effectiveness of the public-sector unions involved in this case.

[43] Petitioners subsequently acknowledge that the unions treated the MEA awards program as nonchargeable. *See* P. Br. at 37 n.28 (citing JA 21).

[44] *See also Bridgeport-Spaulding*, 2986 MERC Op. at 1064 ("assistance to teachers in advancement of their employment opportunities" is an activity "normally and reasonably conducted by an exclusive bargaining agent" and therefore is chargeable to objecting employees).

Nor is it relevant that similar professional activities "were conducted by teacher associations before public-sector bargaining became lawful." P. Br. at 36. The same could be said for many union activities, including conventions, publications, and social activities, that clearly are related to collective bargaining and chargeable to objecting employees.

[45] Petitioners try to defeat the analogy to union social activities by arguing, without citation to any particular articles in the

E. The MEA and NEA Conventions, And The 13E Coordinating Council

The courts below upheld the chargeability of expenditures for the MEA and NEA Conventions, reasoning that "[b]oth are clearly chargeable to [petitioners] under *Ellis*." PA 6a, 57a, 63a. Applying "the same rationale," PA 58a, the lower courts also approved the chargeability of FFA's sending delegates to the 13E Coordinating Council, a forum that "developed bargaining strategies and representational policies for bargaining units, including Ferris State College," PA 6a, 58a. Although these holdings would seem unimpeachable in light of *Ellis*, where the Court "ha[d] very little trouble in holding that petitioners must help defray the costs of [national union] conventions," 466 U.S. at 448, petitioners continue to challenge these expenditures.

First, petitioners contend that Ellis is not controlling in this case because the national union in *Ellis* was formally recognized as the bargaining representative, whereas "[t]he NEA, MEA and 13E Coordinating Council are not the exclusive representative at Ferris." P. Br. at 38.[46] But, as the Court of Appeals noted, this "distinction amounts to [no] more than a technical difference in union organization." PA 6a. Although, in *Ellis*, the national parent organization was officially named as the bargaining representative, this does not alter the fact that the convention at issue in *Ellis* was "a national convention at which the members elect [national] officers, establish [national] bargaining goals and priorities, and formulate overall [national] union policy." 466 U.S. at 448. In short, the structural relationship of the national convention in *Ellis* to the Western Airlines bargaining unit was identical to that of the MEA and NEA Conventions and the 13E Coordinating Council to the FFA bargaining unit. Moreover, it hardly would seem appropriate to have the constitutional rights of objecting employees turn on whether a union, for a variety of organizational reasons having little if anything to do with collective bargaining, followed the practice of having the local union, the national union, or both, officially named as the bargaining representative.

Second, petitioners assert that the MEA and NEA Conventions and the 13E Coordinating Council served "*primarily* political and ideological purposes," P. Br. at 38 (emphasis in original). Although this assertion simply disregards the record in this case,[47] for present purposes it is sufficient to note that the Court in *Ellis* concluded that BRAC could charge for the entire cost of national conventions under the First Amendment even though such conventions "afford opportunities—that often

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Teacher's Voice, that some of the professional activities found chargeable by the courts below "are ideological in nature" because they concern "curriculum and instructional methods." P. Br. at 37. Even if deemed "ideological," however, activities related to these matters would be chargeable because curriculum and instructional methods are common subjects of bargaining for unions that represent educational employees in Michigan. *See, e.g.*, Def. Ex. I, § 3.5 (governing "adoption of new educational policies" and "[p]roposed changes in and additions to institutional policy affecting faculty"), § 6.2(B) (faculty "are entitled to academic freedom in the classroom in discussing their assigned subjects and disciplines"); § 6.2(E) (faculty "are primarily responsible for decisions regarding the instruction of students, in accordance with departmental procedures"). *Cf. Abood*, 431 U.S. at 222 (collective bargaining regarding matters such as abortion and racial discrimination, although clearly relating to "the advancement of ideas," is chargeable).

[46] Petitioners' argument is defective on its own terms. The courts below expressly recognized that, as a matter of state law, "the 'union as affiliated is the exclusive representative,'" *see supra* note 15, and therefore FFA serves as the official bargaining representative for the employees at Ferris State College as a local affiliate of both MEA and NEA.

[47] As noted above, the courts below expressly found that the 13E Coordinating Council "developed bargaining strategies and representational policies for bargaining units, including Ferris State College," PA 6a, and applied "the same rationale" when holding the costs associated with the MEA and NEA Conventions "fully chargeable" to petitioners, PA 57a-58a. Petitioners have selected excerpts from the record in this case in an effort to show that these findings are clearly erroneous, but there is ample support for them in the record, *see, e.g.*, JA 142-43; Trial Testimony of Warren Culver at 197-99; Def. Ex. GGGG at 49-50.

are fully exploited—to further political objectives." 466 U.S. at 459 (Powell, J., dissenting in part) (noting the "major participation of politicians" at the BRAC convention). The holding in *Ellis* that periodic conventions are "normal events" that are "essential to the union's discharge of its duties as bargaining agent" is dispositive here.[48]

F. So-Called "Strike Preparation" Activities

Although public employee strikes are unlawful in Michigan, FFA attempted during collective bargaining "to put pressure on the employer by making outward preparations for a possible strike," including establishment of a "crisis center." PA 20a-30a. Because FFA did not actually engage in a strike,[49] the courts below held that these expenditures fall "within the range of reasonable bargaining tools available to a public sector union during contract negotiations," and are chargeable to petitioners. PA 11a, 59a.[50]

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[48] Petitioners note that the convention in *Ellis* "met only once in four years," and assert that this "is a far cry" from the "*three* conventions and several other meetings held every year" by NEA, MEA, and the 13E Coordinating Council. P. Br. at 38 (emphasis in original). But with this argument petitioners are simply quarreling with the "strategy" that the unions' leadership has decided upon in order to further the collective interests of the employees that they represent.

[49] This fact was "of paramount importance" to the District Court, PA 59a, which found that a $2500 no-interest loan made by FFA to support another bargaining unit that did engage in an illegal strike, PA 59a, and articles in the *Teacher's Voice* that reported on illegal strikes, PA 80a, were not chargeable to petitioners.

[50] In large part, this holding was based on the testimony of the Director of MEA's UniServ Division, particularly his statement that in "only one out of every seven or eight" situations in which strike preparations are made does a strike actually occur. PA 29a. Petitioners suggest that this testimony "should have been disregarded, because it was contradicted by contemporaneous union records" showing that that FFA "intended to strike." P. Br. at 41. But this argument reflects a total failure on petitioners' part to grasp the realities of public-sector bargaining. In order for strike preparations to put pressure on a public employer, the threat must be credible. That hardly would be the case if, while FFA was taking the necessary preparatory actions, FFA also was advising the public that these preparations were only a bargaining ploy.

Petitioners claim that objecting employees "cannot constitutionally be compelled to finance threats to engage in an illegal activity, even as a pressure tactic in bargaining." P. Br. at 41. But the State of Michigan has never declared that it is unlawful, or even contrary to public policy, for a union to threaten an illegal strike. Nor has there been any showing that allowing unions in Michigan to threaten strikes makes it more likely that there will be illegal strikes. To the contrary, by placing pressure on the employer to reach an agreement, the threat of a strike may make it *less* likely that a strike will occur.

In any event, even accepting petitioners' assertion that the activities of FFA to "pla[n] and threate[n] . . . illegal acts," P. Br. at 42, are nonchargeable, the courts below specifically found that the money spent by FFA on so-called "strike preparation" activities—including money expended for rent, insurance, utilities, telephone, equipment, and petty cash in connection with the "crisis center," PA 78a-79a—served other purposes that were plainly chargeable. Thus, the "crisis center . . . serv[d] as a meeting place for the local's membership [and] a base from which tactical activities such as informational picketing can be conducted." PA 30a. This finding, when combined with the lawful goal of putting pressure on the employer to reach an agreement at the bargaining table, amply justifies the conclusion that FFA constitutionally may charge petitioners for these activities.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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